

I. INTRODUCTION

On June 29, 1993 the City of San Jose confirmed the position of the Independent Police Auditor. The office was established for the purpose of auditing the investigations of citizen complaints of misconduct by members of the San Jose Police Department. The Office of the Independent Police Auditor is independent from all other City entities and reports directly to the Mayor and to the City Council.

The Office of the Independent Police Auditor opened its doors to the public on September 13, 1993. The office held an open house on October 1, 1993 to offer members of the public an opportunity to visit the office and to learn about its functions. The office is located at 4 North Second Street, Suite 650, and is easily accessible to the public through private or public transportation. The Office hours are from 8:00am until 6:00pm. Additionally, the staff of the Office of the Independent Police Auditor is willing and able to make arrangements to meet with citizens during weekends or other times in order to accommodate the needs and schedules of citizens.

The Office of the Independent Police Auditor is staffed by three well educated and competent individuals. Both the Independent Police Auditor and the Intake Coordinator are Attorneys, while the Administrative Assistant is in the process of completing the requirements for her Bachelors degree. Additionally, all three staff members are bilingual: the Independent Police Auditor and the Intake Coordinator are fluent in Spanish, while the Administrative Assistant is fluent in Vietnamese. The Independent Police Auditor and the Intake Coordinator completed a course on Internal Affairs Investigations prior to the official opening of the office.

The Office of the Independent Police Auditor has three primary functions: (1) it serves as an alternative forum where citizens may file complaints; (2) it reviews the investigations of citizen

complaints by the San Jose Police Department Internal Affairs Unit; and (3) it promotes public awareness of a citizen's right to file a complaint. The Independent Police Auditor routinely meets with various groups and organizations to increase public awareness of a citizen's right to file a complaint.

This report is the first of four quarterly reports which will be produced by the Office of the Independent Police Auditor pursuant to the requirements of San Jose Municipal Code Section 2.06.020 C. The Ordinance requires that the Auditor prepare a Quarterly Report including:

1. A statistical analysis documenting the number of complaints by category, the number of complaints sustained and the actions taken;
2. An analysis of trends and patterns; and
3. Specific recommendations for change.

This report will address general impressions of the San Jose Police Department, the Internal Affairs Unit and the overall effectiveness of the Office of the Independent Police Auditor. Additionally, this report includes statistical data, which will prove helpful to the public in understanding the process of reviewing complaints against the San Jose Police Department. Finally, this report includes specific recommendations for changes in the existing process of addressing complaints against the San Jose Police Department.

II. STATISTICAL DATA

A. METHODOLOGY

The statistical data compiled by the Office of the Independent Police Auditor encompasses the time period from September 13, 1993 through December 13, 1993. The Office does not have the services of a statistician. Therefore, the data presented reflects the research and calculations of the staff of the Office of the Independent Police Auditor.

The statistics collected by the Office will differ from those collected and disseminated by the Internal Affairs Unit for two reasons. First, the data collected by the Office of the Independent Police Auditor reflects the three-month period, which represents the first quarter of operation of the Office. Second, when totaling the number of complaints filed with the Office, the Office counts both procedural and misconduct complaints¹, while the Internal Affairs Unit counts procedural and misconduct complaints separately, as opposed to combining these two categories into one total number of complaints.

The statistics presented in this report focus primarily on the number of allegations received, as opposed to the number of complaints. This is due to the fact that a single complaint filed by a citizen may contain multiple allegations. For example, a citizen indicating that unnecessary force was used to effectuate their arrest may also state that the officer was rude, or that the officer improperly searched them. Such a citizen would have made a single complaint with three different allegations: Unnecessary Force; Rude Conduct; and Unlawful Search.

¹ The problems created by the distinction between misconduct and procedural complaints is addressed in detail in the Concerns and Recommendations section of this report.

B. TOTAL NUMBER OF COMPLAINTS

The Office of the Independent Police Auditor has received **40** complaints² which were filed directly with the Auditor during the first quarter of operations, and **131** complaints which were submitted by Internal Affairs³ to the Independent Police Auditor for review, for a total of **171** complaints. Of the **171** complaints, the Independent Police Auditor has officially closed⁴ **32** complaints.

C. UNNECESSARY OR EXCESSIVE FORCE

The Independent Police Auditor reviews all complaints alleging excessive or unnecessary force. Within three days of the filing of an unnecessary force complaint, Internal Affairs notifies the Auditor. The Auditor will then monitor the case by reviewing all investigation conducted, and by periodically attending the interviews of civilian witnesses and police officers.

Completed unnecessary force investigations, which were closed after September 8, 1993, are all sent to the Auditor for review. The review consists of reading all the investigative reports, listening to the taped statements of the witnesses and officers, and directly contacting the complainants and witnesses when necessary. The review may also result in requests for additional investigation.

2 The San Jose Police Department defines a complaint as *an act of expressed dissatisfaction, which relates to Department operations, personnel conduct or unlawful acts*. See San Jose Police Department Duty Manual; Section C 1501.5. The **40** complaints filed directly with the Auditor include **25** complaints, which were subsequently classified as “Procedural” Complaints by Internal Affairs.

3 This number includes: (1) Complaints which were *closed* by Internal Affairs after the opening of the Office of the Independent Police Auditor; and (2) Complaints which were *opened* by Internal Affairs after the opening of the Office of the Independent Police Auditor, or which were *open* at the time of the opening of the Office.

4 The term “officially closed” is used by the Office of the Independent Police Auditor to describe cases where the Auditor concurs with the investigative process and finding, and no further investigation or action is required.

In the first quarter, the Office of the Independent Police Auditor has reviewed **63** allegations of Unnecessary Force. Of those allegations, **3** were sustained⁵ and **16** resulted in a finding other than sustained.⁶ There are **44** allegations, which are still pending.

All of the **3** unnecessary force allegations, which were sustained, resulted in the suspension⁷ of the involved officer.

D. OTHER ALLEGATIONS

The Independent Police Auditor is required to review at least **20%** of all other complaints. However, the Auditor chooses to review **100%** of all other complaints, in addition to the unnecessary force cases. The Independent Police Auditor has reviewed a total of **131** allegations, which related to matters other than Unnecessary Force.

- 1. Improper Procedure⁸**
 - 43** allegations
 - 15** sustained
 - 8** resulted in a finding other than sustained
 - 20** allegations are still pending

Of the **15** sustained allegations, **7** resulted in suspensions, **1** resulted in termination⁹, **4** resulted in

⁵ Complaints are sustained when the investigation disclosed sufficient evidence to clearly prove the allegation made in the complaint. San Jose Police Department Duty Manual; Section C 1513.20.

⁶ Internal Affairs employs several other findings to describe situations where an allegation was not proven. This report will not statistically address these other findings. These other findings include: Unfounded; Exonerated; Not Sustained; and No Finding. *See* San Jose Police Department Duty Manual Section C 1513.20. *See* Appendix A-1 for definitions of the other findings.

⁷ When officers are suspended they are given a designated number of hours during which they are prohibited from working. These hours are non-compensated.

⁸ Improper Procedure involves a violation of City policy or of a regulation in the San Jose Police Department Duty Manual. *See* San Jose Police Department Internal Affairs Unit Guidelines; Page 4.

⁹ When officers are terminated their employment as members of the San Jose Police Department is formally ended.

Documented Oral Counseling¹⁰, and 3 resulted in a Letter of Reprimand¹¹.

- 2. Rude Conduct¹²**
 - 36** allegations
 - 4** sustained
 - 9** resulted in a finding other than sustained
 - 23** allegations are still pending

Of the **4** sustained Rude Conduct allegations, **1** resulted in Documented Oral Counseling, and **3** resulted in a Letter of Reprimand.

- 3. Unlawful Arrest**
 - 12** allegations
 - 0** sustained
 - 5** resulted in a finding other than sustained
 - 7** allegations are still pending
- 4. Failure to Take Action**
 - 4** allegations
 - 0** sustained
 - 0** resulted in a finding other than sustained
 - 4** allegations are still pending
- 5. Excessive Police Service¹³**
 - 3** allegations
 - 0** sustained

10 Documented Oral Counseling occurs when a supervisor makes a written record documenting an oral counseling session with an officer. A memo documenting oral counseling does not become part of an officer's personnel file. If a documented oral counseling is the disposition of an Internal Affairs investigation, it will be a part of that file and will be retained in accordance with Records Retention guidelines. See San Jose Police Department Duty Manual Section C 1613.1.

11 A Letter of Reprimand is formal discipline and is included in an officer's personnel file. See San Jose Police Department Duty Manual Section C 1613.5.

12 Examples of Rude Conduct include abusive behavior or language, threats, profanity, and poor attitude while on duty. See San Jose Police Department Internal Affairs Unit Guidelines; Page 4.

13 Excessive Police Service allegations include situations where a citizen feels unjustifiably harassed by a police officer or by multiple police officers on more than one occasion. See San Jose Police Department Internal Affairs Unit Guidelines; Page 4.

0 resulted in a finding other than sustained
3 allegations are still pending

6. Unofficerlike Conduct¹⁴

14 allegations
4 sustained
2 resulted in a finding other than sustained
8 allegations are still pending

Of the 4 sustained allegations, 2 resulted in suspensions, 1 resulted in the termination of the involved officer, and 1 resulted in a Letter of Reprimand.

7. Missing or Damaged Property

5 allegations
2 sustained
0 resulted in a finding other than sustained
3 allegations are still pending

The 2 sustained allegations resulted in 1 Documented Oral Counseling and 1 Letter of Reprimand.

8. Unlawful Search

10 allegations
0 sustained
6 resulted in a finding other than sustained
4 allegations are still pending

9. Discrimination¹⁵

2 allegations, both still pending

10. Sexual Harassment

2 allegations, both still pending

14 The Unofficerlike Conduct allegation deals specifically with off-duty behavior. The conduct, which is the subject of Unofficerlike Conduct complaints often, relates to violation of laws, drug or alcohol use, misuse of City property, gratuities, bribes and abuse of authority. See [San Jose Police Department Internal Affairs Unit Guidelines](#); Page 4.

15 The Discrimination allegation is used by Internal Affairs to classify all types of discrimination (racial, sexual, etc.). See [San Jose Police Department Internal Affairs Unit Guidelines](#); Page 4.

III. CONCERNS AND RECOMMENDATIONS

The organization and responsibilities of the Office of the Independent Police Auditor necessitate that the Office will have more contact with the Internal Affairs Unit than with any other division of the San Jose Police Department.

While the interaction between the Office of the Independent Police Auditor and Internal Affairs has largely been very positive, the relationship has produced and exposed some problems.

A. Procedural Complaints

During the first month of operation of the Office of the Independent Police Auditor, a substantial amount of time was spent examining the statistics compiled by the San Jose Police Department concerning the number of complaints filed by citizens. It was immediately recognized that the Department had a surprisingly small number of complaints for a large police department in a city with a population of over 800,000.

The Office was able to identify the problem after complaints, which were received by the Office, were forwarded to the Internal Affairs Unit for investigation. As Internal Affairs completed the investigations and returned those complaints to the Office, several had been classified by Internal Affairs as ‘Procedural’ complaints. A series of meetings between the staff of the Office of the Independent Police Auditor and Internal Affairs revealed a two-prong classification process which Internal Affairs uses to classify a complaint as procedural or misconduct prior to extensively investigating those complaints.

The problematic distinction between misconduct and procedural complaints creates a perception of impropriety on the part of the San Jose Police Department. This is the most important issue, which has been identified during the first quarter of operation of the Office of the Independent Police Auditor.

1. Defining a Procedural Complaint

CONCERN: The Internal Affairs Unit employs a distinction between “misconduct” and “procedural” complaints which is the source of complicated and confusing problems for citizens and for the Office the Independent Police Auditor.

A misconduct complaint is one, which alleges a violation of Department policy or a violation of law. The problems arise surrounding the classification of a complaint as “procedural.” The San Jose Police Department employs the following guidelines in defining a procedural complaint:

In order to make a determination as to whether a complaint is labeled a Procedural Complaint, the investigator must show that the actions complained about pertained to *an established procedure, properly employed by a Department member*, which the complainant understands but believes is inappropriate or not valid.¹⁶ (emphasis added)

It has been the experience of the Office of the Independent Police Auditor, through interacting with Internal Affairs and reviewing their cases that the use of the Procedural classification needs to be revised.

An audit of the complaints filed by citizens with the Office of the Independent Police Auditor and subsequently investigated by Internal Affairs has revealed that some complaints which allege misconduct are inappropriately classified by Internal Affairs as procedural.

RECOMMENDATION: It is recommended that the procedural classification should only be used where the officer followed Department procedure, but the complaining citizen disagrees *with the procedure itself* and not with the *application of that procedure*. The procedural

¹⁶ Response to Grand Jury: Citizen Complaints and SJPD. Louis A. Cobarruviaz, Chief of Police. November 9, 1993. Page 13.

classification should not be used to classify any complaint where the facts provided by the complaining citizen allege misconduct.

The reformation of the Procedural classification would be facilitated by the creation of clear and uniform guidelines and definitions for the Internal Affairs officers to follow in making the distinction between misconduct and procedural complaints. Additionally, when an Internal Affairs Officer faces a situation in which it is difficult to determine whether to make a complaint, a formal misconduct complaint or a procedural complaint, the officer should choose the most careful and thorough path, make the complaint formal, and have it appropriately investigated as a misconduct complaint.

Internal Affairs should notify citizens in writing about procedural complaints and explain why a particular officer's conduct was procedurally correct. Internal Affairs should cite specific sections of the department's Duty Manual to demonstrate that an officer followed proper procedure.

CORRECTIVE ACTION TAKEN BY THE POLICE DEPARTMENT: Upon recognizing and investigating the problem with the use of the procedural complaint classification, the Independent Police Auditor met with the staff of the Office of the Chief of Police to discuss the problem. The meeting was very positive and very productive, and has resulted in several changes in the manner in which the procedural complaint classification is employed.

As of December 3, 1993, the Police Department has begun to implement several changes in the process of handling Procedural Complaints. These changes include:

- 1) All Internal Affairs officers are required to review each complaint, which they believe is a Procedural Complaint with the Internal Affairs Commander.
- 2) The Assistant Chief of Police will periodically review the Procedural Complaints by auditing a sample of the complaints. This will be done with a panel made up

of the Assistant Chief and a Bureau Chief. The results of their audit will be forwarded to the Internal Affairs Commander with any recommendations.

- 3) The Department will seek information regarding the legality of retaining Procedural Complaints by officer badge number from the City Attorney.
- 4) The Department will continue to explore the idea of redefining the Procedural Complaint category in order to clear up any misunderstandings as to what the Department means by a Procedural Complaint.

Subsequent to the recognition of the procedural complaint problem by the Office of the Independent Police Auditor, some of the complaints which were classified as procedural have been changed to formal misconduct complaints and appropriately investigated by the Internal Affairs Unit.

2. Auditing Procedural Complaints

CONCERN: The Office of the Independent Police Auditor has encountered problems in auditing and tracking the number of complaints against the San Jose Police Department due to the classification of complaints as “procedural”. The San Jose Police Department Duty Manual states:

Internal Affairs personnel processing a complaint will prepare a Procedure Complaint Form in all complaint cases received. The receiver of the complaint will attempt to include on the form as much information as is available and then verify with the complainant, when possible, all information received. The form will then be forwarded to the Commander of Internal Affairs indicating action taken, if any.¹⁷

RECOMMENDATION: The Internal Affairs Unit should implement the use of the Procedure Complaint Form, as mandated by their Duty Manual. Furthermore, the Procedure Complaint Form should always be typed.

¹⁷ San Jose Police Department Duty Manual; Section C 1509.5.

Currently, “procedural” complaints are recorded in a Procedural Log, which does not include the names of the involved officers, and only has a few words describing the nature of the complaint. Additionally, the scant and disorganized information, which is available for review, is in the handwritten notes of the respective Internal Affairs officers. The problem is augmented by the fact that Internal Affairs officers periodically rotate to different units or are promoted and leave the unit, making it even more difficult to contact those officers and determine the substance of individual complaints they may have classified as procedural.

It must be recognized that the Procedural Log contains over 1000 “procedural” complaints for 1993.¹⁸ Based upon the information in the Procedural Log, it appears that many of these matters do relate to procedure. However, absent additional information, it is problematic to review and evaluate these “procedural” complaints.

3. Intervention Counseling and Procedural Complaints

CONCERN: The San Jose Police Department has an Intervention Counseling program which requires any officer who receives 3 or more complaints in a 12-month period to be counseled by their Bureau Chief and the Internal Affairs Commander.¹⁹ This Intervention Counseling occurs irrespective of the finding on a complaint. However, Intervention Counseling is only applicable to those complaints, which are deemed *misconduct* complaints and are given a *formal* investigation and disposition.

Intervention Counseling is *not applicable to the over 1000 procedural complaints*. Without

¹⁸ See San Jose Police Department Internal Affairs Procedural Log. 1993.

¹⁹ Response to Grand Jury: Citizen Complaints and SJPD. Louis A. Cobarruviaz, Chief of Police. November 9, 1993. Page 3.

appropriate tracking of the number of procedural complaints per officer, the Intervention Counseling program cannot meet its objective of providing counseling to officers who are receiving unusually high numbers of citizen complaints.

It is important to recognize that many of the complaints which are labeled “procedural” by Internal Affairs are still investigated. The problem occurs because of the perception of impropriety, which arises from classifying complaints as relating to procedure when the complaining party has alleged misconduct.

B. Potential bias within the Internal Affairs Unit

CONCERN: There are some citizens who file multiple complaints against the San Jose Police Department during a relatively short period of time. Some of these same citizens will also repeatedly contact the Office of the Independent Police Auditor. Such citizens contact the Internal Affairs unit with such frequency that their names are well known to the Internal Affairs staff.

Some of these citizens who file an unusually high number of complaints occasionally make those complaints without having the appropriate justification or facts to support such complaints. While the temptation might be to dismiss such citizens, each complaint must be treated with a uniform and consistent degree of seriousness and objectivity.

RECOMMENDATION: When an Internal Affairs officer has had significant prior contact with a complaining citizen, that Internal Affairs officer should not investigate that citizen’s complaint. This will avoid the dangers of unconsciously reaching preliminary conclusions about the legitimacy of the complaint.

There should also be a process, which permits an Internal Affairs officer to defer to another Internal Affairs officer when they have had significant interaction with the officer who is being investigated. Problems may arise when an officer is investigating another officer with whom they have had significant contact. Prior positive or negative experiences with an officer may compromise the requisite impartiality with which the Internal Affairs officers should approach every complaint.

C. Objectivity of the Internal Affairs Intake Process

CONCERN: A significant number of citizens who filed their complaints with Internal Affairs subsequently approached the Office of the Independent Police Auditor and expressed their opinion that their accounts were not believed or that Internal Affairs investigators made them feel that they provoked the problem which they were complaining about.

Some citizens complain that during the initial interview certain Internal Affairs officers display an attitude which leads to the perception that their job is to disprove the complaining party, as opposed to objectively investigating the complaint.

RECOMMENDATION: In order to change the above perception, it is suggested that when a complainant goes to the Internal Affairs Office to file a complaint, that they be allowed to give an uninterrupted account of what occurred. Only following this uninterrupted account should the Internal Affairs Officer proceed with the targeted questions, which characterize an investigative interview.

It is also recommended that the Internal Affairs Unit explore how it's officers can change and improve their verbal and physical communication techniques such that citizens do not leave the office with the perception that they were not believed, not taken seriously, or that their complaints will not be thoroughly investigated.

IV. OBSERVATIONS

The experiences of the first three months of operation of the Office of the Independent Police Auditor indicate that the Office is addressing the public desire for an alternative to filing complaints with Internal Affairs. The Office is receiving large numbers of complaints from individuals who indicate that they would never have made a complaint had the Office of the Independent Police Auditor not been available. Complaining citizens express that they feel more comfortable filing complaints with the civilian staff of the Office of the Independent Police Auditor than with the police officers at Internal Affairs.

The Independent Police Auditor has met with several organizations representing various ethnic and political interests, which have shown a willingness to work with the Office. Particular appreciation is extended to the NAACP, the ACLU, the Santa Clara County Bar Association, the Direct Action Alliance, Channel 14, Channel 11, the Society for Hispanic Engineers, the Bench/Bar/Media/Police Committee, Lincoln Law School, The Police Academy at Evergreen Valley College, San Jose State University, the Human Rights Commission of Santa Clara County, the Santa Clara County Grand Jury, and the Emergency Housing Consortium. These groups have assisted the Office of the Independent Police Auditor through increasing public awareness of the existence and functions of the Office.

One of the problems encountered by the Office of the Independent Police Auditor has been that a small percentage of the individuals who file complaints consume a high percentage of time and energy. Some citizens misunderstand the purposes and results of filing a complaint. Some citizens have expressed the mistaken belief that filing a complaint will aid their pending criminal cases or appeals. The Office of the Independent Police Auditor routinely explains that the purpose of the complaint process is to address police misconduct, not to prove or disprove factual matters relating to pending criminal cases, appeals, or even civil suits.

Another problem encountered by the Office of the Independent Police Auditor has been the amount of time expended surrounding matters not addressed by the Office. There are numerous inquiries which are fielded by the Office which do not relate to allegations of police misconduct.

Despite the fact that the Independent Police Auditor is classified and compensated as an independent contractor working a 20 hour week, the Independent Police Auditor spends an average of 35-40 hours per week at the Office. The Independent Police Auditor will continue to track the time she spends at the Office in an effort to assess whether or not the position should be expanded to full time in the future.

The first three months of operation of the Office of the Independent Police Auditor have resulted in the successful opening and organization of the Office. The Office is effectively performing it's functions of providing an alternative to the Internal Affairs process and of increasing public confidence in the handling of allegations of misconduct against members of the San Jose Police Department.

V. CONCLUSION

The first three months of operation of the Office of the Independent Police Auditor have been characterized by very positive overall interaction with the San Jose Police Department.

The primary function of the Office of the Independent Police Auditor is to critically analyze the process through which the San Jose Police Department addresses complaints against its officers. This report has made observations and suggested changes in the Internal Review process.

In the event that there is a disagreement over a particular case, which the Auditor has been unable to resolve with the Internal Affairs Unit and the office of the Chief of Police, the dispute will ultimately be resolved and settled by the City Manager, the Mayor and the City Council. It is essential to recognize that, so far, the Auditor has not had to employ this procedure. This is reflective of the overall cooperative interaction between the Office of the Independent Police Auditor and the Internal Affairs Unit.

The Internal Affairs Unit is staffed by highly competent and professional individuals. However, like any organization, the Unit has its strengths and weaknesses. This quarterly report and the three which follow will continue to convey the impressions, statistics and recommendations of the Office of the Independent Police Auditor.

APPENDIX A-1

DEFINITIONS OF FINDINGS

1. **SUSTAINED:** The investigation disclosed sufficient evidence to clearly prove the allegation made in the complaint.

2. **NOT SUSTAINED:** The investigation failed to disclose sufficient evidence to clearly prove the allegation made in the complaint or to conclusively disprove the allegation.

3. **EXONERATED:** The acts, which provided the basis for the complaint or allegation, occurred; however, the investigation revealed that they were justified, lawful and proper.

4. **UNFOUNDED:** The investigation conclusively proved that the act or acts complained of did not occur. This finding also applies when the individual member(s) or employee(s) named were not involved in the act or acts, which may have occurred.

5. **NO FINDING:** The complainant failed to disclose promised information to further the investigation; or the investigation revealed that another agency was involved and the complaint or complainant has been referred to that agency; or the complainant wishes to withdraw the complaint; or the complainant is no longer available for clarification.